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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 758

GEORGE D. QUIGLEY and SAFEWAY TRAILS, INC., *Petitioners,*

v.

THE PUBLIC SERVICE COMMISSION OF MARYLAND, PENNSYLVANIA GREYHOUND, a Corporation, and CAPITAL TRANSIT COMPANY, a Corporation.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MARYLAND, AND BRIEF IN SUPPORT THEREOF.

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INDEX.

	Page
Petition for Writ of Certiorari	1
Jurisdiction	2
Questions Presented	2
Statement of Case	2
Specification of Errors	5
Brief in Support of Petition	7
1. The Court of Appeals of Maryland Erred in Reversing the Chancellor Below by Dismissing the Appeals Upon the Pleadings	7
2. The Court Erred in Holding That the Order of the Commission Based Upon Evidence That Was Not Introduced at the Hearing and Not Made Subject to Cross-Examination Was Valid	11
3. The Court Erred in Holding That the Public Service Commission Could Permit One Interstate Carrier to Have Exclusive Local Rights and Deny the Same Privilege to Another Interstate Carrier Which Has Been Operating on the Same Highway and Between the Same Termini	14
4. The Court Erred in Holding That the Public Service Commission Could Deny Safeway Trails the Right to Make Full Use of Its Facilities Which Were Provided as a Result of a Public Need, Causing a Curtailment of Its Interstate Activities	16

TABLE OF CASES.

Baldwin v. Public Service Commission, 160 Md. 202, 150 Atl. 907	8
Brinkerhoff-Farris Trust & Savings Co. v. Walter O. Hill, 281 U. S. 673, 74 L. Ed. 1107	10
Buck v. Kuykendall, 267 U. S. 307, 45 S. C. 324, 69 L. Ed. 623	15, 17
Bush v. Maloy, 267 U. S. 317, 45 S. C. 326, 69 L. Ed. 627	15, 17

Page

Chicago Junction Case (B & O R. R. Co. v. United States), 264 U. S. 258, 263-265, 68 L. Ed. 667, 673, 674, 44 S. Ct. 317 14
Crisfield v. Public Service Commission, 183 Md. 179 ... 8
Farmers' Elevator Co. v. Chicago R. I. & P. R. Co., 266 Ill. 567, 107 N. E. 841 12
Fornum v. Public Utilities Commission, 158 Atl. 713 .. 15
Hyman v. Taylor, 52 At. 2d 610-612 12
Intermountain Rate Cases, 234 U. S. 476, 491 10
Interstate Commerce Commission v. L. & N. R. R. Co., 227 U. S. 88, 91, 33 S. Ct. 185, 57 L. Ed. 431 .....9, 13
Kline v. United States, 41 D. Supp. 577, 582 12
Morgan v. United States, 304 U. S. 118, 58 B. C. 773, 82 L. Ed. 1129 13
Morris and Hershberg, Inc. v. Securities & Exchange Commission, 163 F. 2d 689, 692 13
Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 81 L. Ed. 1093 13
Pacific Telephone & Telegraph Co. v. Tax Commission of the State of Washington, 297 U. S. 803 17
Philadelphia Company v. Securities & Exchange Commission, 76 Wash. Law. Rep. 342 10
Postal Telegraph Cable Co. v. Newport, 247 U. S. 464, 38 S. Ct. 566, 62 L. Ed. 1215 ..... 7, 8
Public Service Commission v. Byron, 173 Md. 464, 138 Atl. 404 8
Public Service Commission v. Williams, 167 Md. 316, 173 Atl. 259 8
Rochester Telephone Case, 307 U. S. 125 10
South Carolina State Highway Dept. v. Barnwell, 303 U. S. 177, 82 L. Ed. 734 15
United States v. Abilene & S. R. Co., 265 U. S. 274, 288, 68 L. Ed. 1016, 1022, 44 S. Ct. 565 13
West Ohio Gas Co. v. Public Utilities Commission (No. 1) supra, 294 U. S. p. 69, 79, L. Ed. 768, 55 S. Ct. 316 13
Williams v. Tooke, et al, 108 Fed. 2d 758 9

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MARYLAND.

George D. Quigley and Safeway Trails, Inc. pray that a writ of certiorari issue to review the decree of the Court of Appeals for the State of Maryland entered in the above entitled case on January 23, 1948 (R. 102). The original opinion was entered on January 14, 1948 (R. 87) and motion for re-hearing denied on February 24, 1948 (R. 113).

Opinion Below.

The opinion of the Court of Appeals for the State of Maryland has been officially reported in 56 Atl. 2d at page 835, and appears in the record on page 87.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code as amended by Act of February 3, 1925.

Questions Presented.

Did the failure of the Appellate Court to examine the record before the Public Service Commission to determine if there was any basis for the order of the Commission deprive petitioners of such judicial review as contemplated under the due process clause of the Constitution?

Was the order of the Commission based upon evidence not introduced at the hearing or made subject to cross examination a violation of petitioner's right to a fair trial under the due process clase of the Constitution?

Does the order of the Public Service Commission as affirmd by the Court of the Appeals deny petitioners the equal protection of the laws by discriminating against the petitioner, Safeway Trials, Inc., in favor of another interstate carrier?

Does the order of Public Service Commission as affirmed by the Court of Appeals in depriving the petitioner the full use of its facilities place an undue burden on petitioner's interstate activities in violation of the Commerce Clause?

Statement of Case.

Pennsylvania Greyhound and Safeway Trails, Inc. are motor bus carriers operating between Washington, D. C. and Baltimore, Maryland over United States Route 1, known as the Washington-Baltimore Boulevard. Both are duly certificated interstate carriers. Each also has an intrastate franchise to operate locally in Maryland. However, Safeway Trails is prohibited from picking up and discharging passengers at all local points in this area, other than the southwest side of Hyattsville, Maryland, while the Greyhound Company enjoys a monopoly in pro-

viding local service between every intermediate point on the Washington-Baltimore Boulevard other than between College Park, Maryland and Hyattsville, Maryland. The Capital Transit Company has the exclusive franchise for local service in the areas south of College Park, Maryland.

From June 4, 1942 to September 30, 1945, Safeway participated in providing an unrestricted, coordinated local passenger service by motor bus with Greyhound between Baltimore and College Park over United States Highway No. 1. This service was furnished with the approval and authority of the Public Service Commission of Maryland. Safeway added to its facilities and personnel, and increased its interstate service in order to meet the public demand. As the result of the services by Greyhound and Safeway, the public enjoyed an adequate bus service, to which it is rightfully entitled.

This authority was withdrawn from Safeway on September 30, 1945, at the request of Greyhound (R. 34). With the denial of the use of Safeway's facilities, the riding public became subject to an unsatisfactory and inadequate service that was being furnished solely by the Pennsylvania Greyhound Company. As the result of this situation, petitioner Quigley, as a bus rider, filed with the Public Service Commission a petition accompanied by the signatures of more than 1,000 persons similarly situated, in addition to endorsements of civic organizations and municipal authorities of all incorporated towns in Prince George's County, Maryland, which border upon the highway involved and by the County Commissioners of Howard County (R. 32, 33).

On October 1, 1946, Safeway filed an application for removal of the restrictions in its certificate in order that it might restore the service that it had furnished the public during the period between 1942 and 1945. Since Quigley and Safeway sought substantially the same relief, both cases were consolidated for hearing, which consumed seven days (R. 33).

The two cases before the Public Service Commission are replete with indisputable testimony in support of the existence of a public demand and need for local service by Safeway and the continued inadequacy of local service offered by Greyhound, the only common carrier of passengers authorized to use the public highway between College Park and Baltimore in the local service (R. 35).

On January 22, 1947, two members of the Commission (with one dissenting) issued an order denying the request for removal of restrictions. On March 12, 1947, the same two members of the Commission, after a re-hearing, passed an order denying the petitions of Safeway and Quigley predicated upon "observations made by members of the Commission's staff . . . ." which were neither introduced in evidence nor an opportunity given to petitioners to cross-examine on these observations (R. 17).

Your petitioners filed an appeal from the order of March 12, 1947, to the Circuit Court for Prince George's County, pursuant to the provisions of Section 415 of Article 23 of the Code of Laws for the State of Maryland.

The appeals allege that the action of the Public Service Commission of Maryland is unreasonable and unlawful, that the present service is inadequate and describe in detail the inadequacy of the service being furnished. They state the services of Safeway are required (R. 4). They also allege that the interstate service of Safeway is unduly burdened by the discriminatory action on the part of the Public Service Commission in depriving it of the right to make use of its available facilities (R. 9). It is further charged that the order of the Commission is illegal, since it is based upon information and evidence which did not appear in the record at the hearing and was not subject to cross-examination (R. 6, 37).

To the appeals the defendants filed demurrers in which they attacked the sufficiency of the complaint and the right of the petitioners to appeal.

The Chancellor for the Circuit Court overruled the demurrers on the ground that there was no record presented

to the Court from which it could be shown that the order of the Commission was supported by any evidence. In the absence of any support of the Commission's order and the acceptance of the charges in the complaint as being true, the action of the Commission would be arbitrary, capricious and thus unlawful (R. 83). On appeal, the Maryland Court of Appeals, notwithstanding the legal admission of the foregoing, reversed the Chancellor on the single ground that the complaint failed to state a cause of action (R. 101).

Specification of Errors to be Urged.

The Court of Appeals for the State of Maryland erred:

(1) In reversing the ruling of the Chancellor who had overruled the demurrers since the pleadings revealed there was no evidence to support the order of the Public Service Commission and that on the face of the appeal the action of the Public Service Commission was unlawful and unreasonable.

(2) In holding that the order of the Commission, based upon evidence that was not introduced at the hearing and not made subject to cross-examination, is valid.

(3) In holding that the Public Service Commission could permit one interstate carrier to have exclusive local rights and deny the same privilege to another interstate carrier which has been operating on the same highway and between the same termini.

(4) In holding that the Public Service Commission could deny Safeway Trails the right to make full use of its facilities which were provided as the result of a public need, causing a curtailment of its interstate activities.

(5) In reversing the judgment of the Circuit Court for Prince George's County.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue to review the decree of the Court of Appeals of Maryland.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION.

---

(1) The Court of Appeals of Maryland erred in reversing the Chancellor below by dismissing the appeals upon the pleadings.

Since the case proceeded to judgment upon the pleadings, it is elementary that every uncontradicted allegation of fact by the unsuccessful party must be taken as true. *Postal Telegraph Cable Company* v. *Newport*, 247 U.S. 464, 38 S. Ct. 566, 62 L. Ed. 1215. Hence, the allegations of inadequacy of the service furnished by Pennsylvania Greyhound and the demand for relief, after an opportunity had been given to Pennsylvania Greyhound to correct the situation, by all persons in areas affected, remain unchallenged. (R. 35). Likewise, the allegation that Safeway is denied

the opportunity to make full use of its facilities in its interstate service as the result of the action of the Public Service Commission of Maryland is uncontradicted (R. 9).

The Court of Appeals of Maryland has recognized that the public is entitled to an adequate service and any action by the Public Service Commission denying such must have substantial evidence to support it. *Crisfield* v. *Public Service Commission* 183 Maryland 179, *Public Service Commission* v. *Byron,* 153 Md. 464, 138 Atl. 404, *Baldwin* v. *Public Service Commission* 160 Md. 202, 150 Atl. 907, *Public Service Commission* v. *Williams,* 167 Md. 316, 173 Atl. 259.

Article 23, Section 415 of the Maryland Code of Laws provides for judicial review of any action of the Public Service Commission in the Circuit Court for any County or before any judge of the Supreme Bench of Baltimore City to vacate and set aside any such order on the ground that it is unlawful and unreasonable (R. 95). In the light of this statutory provision and the interpretation heretofore given by the Maryland Court of Appeals, we respectfully submit that the failure to examine the record deprived the petitioners of such judicial review as is encompassed in the due process clause of the Constitution. Unless this Court reverses the action of the Maryland Court of Appeals in this case, future petitions in either interstate or intrastate service will be denied that judicial review contemplated by the 14th Amendment.

In the case of *Postal Telegraph Cable Company* v. *Newport, supra,* this Court reversed the Court of Appeals of the State of Kentucky which had dismissed the action on the pleadings without examining the record. Mr. Justice Pitney in delivering the opinion of the Court in 62 L. Ed. at page 1220, said:

> "But the question arises whether the basis of fact upon which the state court rested its decision denying the asserted Federal rights has any support in the record; for if not, it is our duty to review and correct the error." (citing many cases)

In *Williams, et al.* v. *Tooke, et al.*, 108 Fed. 2d 758, it was held:

> "If a case between private parties is arbitrarily and capriciously decided in violation of federal principles of law and contrary to *undisputed facts*, though the court so deciding had jurisdiction over the suit, the judgment may be in violation of the Fourteenth Amendment." (Italics furnished.)

We respectfully submit that the instant appeals contain undisputed facts which the Maryland Court of Appeals seems to have ignored. This action we contend would constitute that arbitrariness and capriciousness indicated in *Williams* v. *Tooke, supra*, and hence in violation of the Fourteenth Amendment. In the case of *Interstate Commerce Commission* v. *L & N R. R. Co.*, 227 U.S. 88, 91, 33 S. Ct. 185, 57 L. Ed. 431, this Court rejected the contention of the Interstate Commerce Commission that its conclusions must be accepted without inquiry. Said the Court:

> "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is *arbitrary and baseless*. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and come under the Constitution's condemnation of all arbitrary exercise of power.
>
> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was con-

trary to the '*indisputable character of the evidence*'." (Emphasis furnished.)

The Federal guarantee of due process applies to state action through its judicial as well as through its legislative, executive or administrative branch of the Government. (See *Brinkerhoff-Farris Trust & Savings Company* v. *Walter O. Hill,* 281 U.S. 673, 74 L. Ed. 1107.) While it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law.

The crux of the opinion of the court below may be found in the following observation by Judge Collins:

> "The court can not substitute its judgment for the judgment of the Commission. It may be that had we been sitting in the place of the Commission, we might have passed different orders. However, we can not substitute our judgment for that of the Commission." (R. 97)

The Court misconstrued the purpose of Section 415 of Article 23 of the Maryland Code, providing for the right to judicial review from orders of the Commission. Petitioners did not seek to substitute the judgment of the court for that of the Commission, but only a determination by the court of substantial questions as to the validity of the Commission's "order" in terms of its constitutional and statutory foundation, and its satisfaction of the requirements of law in respect of burden of proof. (See *Philadelphia Company* v. *Securities and Exchange Commission* (76 Wash. Law Report 342).)

The appeals allege that the action of the Public Service Commission is unreasonable and unlawful, and the opinion of the court below recognizes the specific charges in support of these allegations. As was stated in *Intermountain Rate Cases,* 234 U. S. 476, 491, the ruling in which was approved in the *Rochester Telephone case,* 307 U. S. 125:

> "An investiture of a public body with discretion does not imply the right to abuse but on the contrary car-

> ries with it as a necessary incident the command that the limits of a sound discretion be not transcended which by necessary implication carries with it the existence of judicial power to correct wrongs done by such excess."

It is our contention that since the Maryland statute provides for a judicial review, that contemplates and requires an examination of the record before the Public Service Commission in order to determine if there is any evidence to support the findings of the Commission. A fortiori where, as in the instant case, it is specifically charged and not disputed that there is no evidence to support the Commission's finding. Such a finding without substantial support in the evidence, contrary to the indisputable character of the evidence, is erroneous as a matter of law, lacking due process.

(2) The Court erred in holding that the order of the Commission based upon evidence that was not introduced at the hearing and not made subject to cross-examination was valid.

The appeals specifically allege that Order No. 4795, upon which the Order of the Public Service Commission was based, contains the following:

> "Reports of observations made by members of the Commission's staff that the intrastate motor bus service along the Washington-Baltimore Blvd., between Baltimore and the Maryland-District of Columbia line, which has been the subject of controversy in this case, is adequate." (R. 17.)

The appeals charge that the Commission went outside of the record to reach its conclusions. While it is recognized that the Commission has the right to make its investigations, nevertheless, if such investigations are to be a determining element in a proceeding before it, all parties should have the opportunity to examine such reports and be given the privilege of cross-examination. The Court of Appeals

seemed to recognize the validity of this contention, but failed to apply this law in its decision. In the opinion of Judge Collins, we find the following:

> "Of course, the Commission, being a quasi-judicial tribunal, must act solely on the evidence before it and not on the knowledge or information otherwise acquired by it but not offered in evidence. (*Hyman* v. *Taylor*, 52 At. 2d 610-612, and cases cited). . . If the Commission on March 12, 1947, improperly considered observations by its own members, or members of its staff, not offered in evidence, this would not invalidate its original order." (R. 98.)

Our appeal is from the final order and we respectfully submit that such a conclusion is not in accord with the requirements of a fair trial provided for under the "due process" clause of the 14th Amendment. It will be noted that the Court cited no authority to support this conclusion.

In *Farmers' Elevator Co.* v. *Chicago, R. I. & P. R. Co.*, 266 Ill. 567, 107 N.E. 841, the Illinois Supreme Court held that an order of a state public utilities commission directing a connection to be made between two railroads at a certain place could not be sustained if it was based upon an independent investigation which the commission had made, and not upon the evidence presented at the public hearing required by the statute. It was observed:

> "An order of this nature must be based upon the evidence presented in the public hearing, with a full opportunity to cross-examine the witnesses and present, if desired, evidence in rebuttal, and not upon an ex parte examination."

In the case of *Kline* v. *United States*, 41 F. Supp. 577, 582, we find the general rule of law is that nothing can be treated as evidence that is not introduced as such. Certainly the observations of the Commission which it saw fit to include in its Order No. 4795, and which formed the basis of its conclusion, were not introduced in evidence so that petitioners could have examined into the circumstances

at the time these were made. In the case of *I.C.C.* v. *L. & N. Railway Co., supra,* we find the following:

> "The fact that the final order of the commission might be justified on the merits does not obviate the requirement of a fair trial. The requirement of a fair trial is binding on administrative agencies as well as on the courts."

To the same effect, see *Morgan* v. *United States,* 304 U.S. 118, 58 S.C. 773, 82 L. Ed. 1129, and *Morris and Hershberg, Inc.* v. *Securities & Exchange Commission,* 163 F. 2nd 689, 692.

In the case of *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U.S. 292, 81 L. Ed. 1093, we find the following:

> "In Ohio, the sole method of review is by petition in error to the Supreme Court of the State, which considers both the law and the facts upon the record made below, and not upon new evidence. In such circumstances judicial review would be no longer a reality if the practice followed in this case were to receive the stamp of regularity. To put the problem more concretely: how was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable?"

The Court further stated at page 304 of the same decision that:

> "What the Supreme Court of Ohio did was to take the word of the Commission as to the outcome of a secret investigation, and let it go at that. 'A hearing is not judicial, at least in any adequate sense, unless the evidence can be known.' *West Ohio Gas Co.* v. *Public Utilities Commission* (No. 1) supra (294 U.S. p. 69, 79 L. Ed. 768, 55 S. Ct. 316). Cf. Interstate Commerce Commission v. Louisville & N. R. Co. 227 U.S. 88, 91, 57 L. Ed. 431, 33 S. Ct. 185; United States v. Abilene & S. R. Co. 265 U.S. 274, 288, 68 L. ed. 1016, 1022, 44

S. Ct. 565; Chicago Junction Case (Baltimore & O. R. Co. v. United States), 264 U.S. 258, 263-265, 68 L. ed. 667, 673, 674, 44 S. Ct. 317."

In view of the foregoing, we respectfully submit that it was error for the Court to sustain the order of the Commission based on information that was not introduced at the hearing or subjected to cross-examination.

(3) The Court erred in holding that the Public Service Commission could permit one interstate carrier to have exclusive local rights and deny the same privilege to another interstate carrier which has been operating on the same highway and between the same termini.

While we recognize the right of the Public Service Commission of Maryland to regulate intrastate service under its police power, we contend that such regulation must not be discriminatory. The pleadings reveal that as a result of the coordinated service, Safeway had increased its investment in equipment and personnel in order to furnish the public generally between Washington, D. C. and Baltimore, Maryland, a more adequate and satisfactory service. All this was done with the approval of the Public Service Commission and was of great benefit to the riding public in that more frequent schedules and more comfortable equipment was made available. We do not have a situation in which a new carrier is endeavoring to come into a competitive field. On the contrary, we have an old and established interstate carrier that has been operating on the same route with another interstate carrier over a period of years between the same termini and furnishing local service with the approval and consent of the Public Service Commission. It should also be noted that Safeway is a certificated intrastate carrier in Maryland. Without just cause, and contrary to the undenied public need, that right is suddenly taken from one of the interstate carriers and the exclusive franchise given to the interstate competitor. Such action, we contend, is an unconstitutional discrimination

and fails to afford Safeway the equal protection of the laws.

In the absence of Federal legislation and the exercise of its police power, the state may make reasonable regulations for motor vehicles operating as common carriers over its highways, although engaged in interstate commerce, but such regulations must be uniform and not discriminatory. *Fornum* v. *Public Utilities Commission*, 158 At. 713.

The Commerce Clause of the Federal Constitution, by its own force, prohibits discrimination against interstate commerce, whatever its form or method. *South Carolina State Highway Dept.* v. *Barnwell*, 303 U.S. 177, 82 L. ed. 734.

The action of the Public Service Commission in denying Safeway the right to continue its operations is similar to the action of a Washington Commission which was condemned in the case of *Buck* v. *Kuykendall*, 267 U.S. 307, 45 S.C. 324, 69 L. ed. 623, in which this court held:

> "Appropriate state regulations adopted primarily to promote safety upon the highways and conservation in their use are not obnoxious to the commerce clause when the indirect burden imposed upon interstate carriers is not unreasonable. . . . The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to a conservation of the highways, but *the prohibition of competition. It determines not the manner of use, but persons by whom the highways may be used. It prohibits such use to some persons while providing it to others for the same purpose and in the same manner.*" (Emphasis furnished)

To the same effect, see *Bush* v. *Maloy*, 267 U.S. 317, 45 S.C. 326, 69 L. ed. 627.

In view of the foregoing, we respectfully submit that the action of the Commission as affirmed by the Maryland Court of Appeals in preventing Safeway from continuing with its local operations in the face of an undisputed need,

deprives it of the equal protection afforded under the Constitution.

(4) The Court erred in holding that the Public Service Commission could deny Safeway Trails the right to make full use of its facilities which were provided as a result of a public need, causing a curtailment of its interstate activities.

As has been heretofore indicated, as a result of the coordinated service, Safeway had increased its investment in equipment and personnel in order to furnish the public generally between Washington, D. C. and Baltimore, Maryland a more adequate and satisfactory service. The action of the Commission now makes it imperative for Safeway to curtail the number of schedules it can profitably operate and withdraw from service some of the equipment, with the attendant loss both to Safeway and the public generally in its interstate operations. Safeway has been losing approximately $10,000.00 per month (R. 9). This question of undue burden on interstate commerce was urged in the pleadings and the briefs (R. 9, 110). Since the Public Service Commission of Maryland has already issued an intrastate certificate to Safeway Trails, it has thus recognized that this carrier is fit, able and proper to operate its motor buses in the State of Maryland. Nevertheless, in addition to the discrimination hereinbefore discussed, we find that the interstate operations of this carrier are being unduly burdened since it will be denied the opportunity to make use of all its available facilities and personnel.

We believe it will be conceded that neither the legislature nor the Public Service Commission of Maryland may enact laws or regulations which will discriminate between interstate carriers or place an undue burden on their interstate activities. (See cases collected in 128 ALR 876). We must, therefore, consider whether denial to Safeway to pick up and discharge local passengers with its available facilities comes within the foregoing constitutional prohibition.

The opinion of the court below is similar to that advanced by the Washington State Commission in the case of *Buck* v. *Kuykendall, supra.* In that case, a certificate was denied because the local commission did not want to permit competition. On page 626 of 69 L. ed., we find the commission urging that the state statute is not objectionable because it is designed primarily to promote good service by excluding unnecessary competing carriers. That purpose also is within the state's police power. However, Justice Brandeis, speaking for the Court, said:

> "The argument is not sound. It may be assumed that Section 4 of the state statute is consistent with the 14th Amendment; and also that appropriate state regulations, adopted primarily to promote safety upon the highways and conservation in their use, are not obnoxious to the Commerce Clause where this indirect burden imposed upon interstate commerce is not unreasonable (citing cases). . . . The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to conservation of the highway, *but the prohibition of competition.* It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose in the same manner." To the same effect, see *Bush* v. *Maloy, supra.*

Insofar as the undue burden on interstate commerce is concerned, we contend that where interstate and intrastate commerce are served by the same instrumentality of common carrier and a regulation of the state applied directly to the intrastate business, in fact burdens the interstate, Congress may remove the burden since state regulation must yield to the primary power of Congress to assure adequate interstate service. *Pacific Telephone & Telegraph Co.* v. *Tax Commission of the State of Washington,* 297 U.S. 803.

In the instant case, we have two interstate carriers, both engaged in interstate and intrastate activities. We have

heretofore shown that by virtue of the discrimination against one of these carriers, its interstate operations have been hampered and curtailed with an attendant loss to both carrier and public. It is our further contention that if it can be shown, as has been done in the instant case, that by experience and need, the interstate carrier requires local patronage and has already provided the necessary facilities and personnel, then, and under such circumstances, the Commerce Clause would preclude or prohibit the Public Service Commission from denying such interstate carrier local rights with another interstate carrier operating upon the same highway.

We respectfully contend that the action of the Commission as affirmed by the Maryland Court of Appeals in denying Safeway's petition to serve the public in response to the great demand and need still existing, constitutes an unjust discrimination and places an undue burden upon its ability to render adequate interstate service in violation of its constitutional rights.

Respectfully submitted,

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